

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-219330

**DATE:** September 20, 1985

**MATTER OF:** Martin Electronics, Inc.

**DIGEST:**

1. Protest of agency's refusal to approve protester as a mobilization base producer eligible to compete for restricted procurement under 10 U.S.C. § 2304(a)(16) is timely even though it was not filed within 10 working days after the protester was told that it could not be approved due to a temporary freeze on adding new base producers, since the record is unclear as to what the protester may have been told about the possible duration of the freeze. Protest against restriction of procurement to mobilization base producers is also timely since it was filed prior to the extended date for receipt of initial proposals.
2. In procurements negotiated under authority of 10 U.S.C. § 2304(a)(16), the usual concern for obtaining maximum competition is secondary to the needs of industrial mobilization, and competition may be restricted to predetermined mobilization base producers in order to create or maintain their readiness to produce critical supplies in case of national emergency.
3. Protest of agency's refusal to accept the protester as an approved mobilization base producer so that it could compete in a procurement restricted to such producers is denied since the solicitation was issued to support the existing mobilization base, and there was no need to expand the existing base. There is no requirement that all qualified firms be accepted as mobilization base producers without regard to whether the agency's anticipated needs will be sufficient to support additional producers.

Martin Electronics, Inc. (MEI), protests its exclusion from the competition under request for proposals (RFP) No. DAAA09-85-R-0339 issued by the Department of the Army. This solicitation invited proposals for a quantity of MJU 7/B infrared flares and was restricted to mobilization base producers under authority of 10 U.S.C. § 2304(a)(16) (current version at 10 U.S.C.A. § 2304(b)(1)(B) (West Supp. 1985)). Although MEI is not such a producer for this flare, it insists that it is qualified to make the flare and contends that it has been denied a fair and equal opportunity to compete for the contract award.

We deny the protest.

The proposed solicitation was synopsisized in the Commerce Business Daily (CBD) on January 18, 1985, and clearly stated that the procurement was restricted to the five listed mobilization base producers. The synopsis also stated that the RFP would be issued on or about January 22 with the closing date for receipt of proposals being 30 days thereafter. The closing date was later extended to August 20. On March 20, MEI was told by the Army that it could not be added to the mobilization base for the specified flare because of a temporary freeze imposed by the Army. MEI's protest was received by our Office on July 8.

The Army contends that MEI's protest is untimely because the CBD synopsis of January 18 clearly indicated that the initial closing date for receipt of proposals would be February 22 and that the procurement was restricted to mobilization base producers. Because the CBD synopsis constituted constructive notice of its contents, the Army argues that MEI knew or should have known the basis for its protest as a result of the January 18 announcement and, in any event, should have protested no later than 10 working days from the initial closing date of February 22.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1)(2) (1985), require that protests based upon alleged improprieties in an RFP which are apparent prior to the closing date for receipt of initial proposals be filed prior to that date and that protests based on other grounds be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. To the extent MEI is protesting the restriction to mobilization base producers, we consider the protest timely since it involves an apparent solicitation impropriety and it was filed well in advance of the extended closing date of

August 20 for receipt of initial proposals. See Lab Methods Corp., B-215526, July 17, 1984, 84-2 CPD ¶ 60.

To the extent MEI is protesting the Army's refusal to accept MEI as a mobilization producer, we do not agree that the CBD synopsis was constructive notice of this basis for protest since it was not until March 20 that MEI was told that it would not be accepted as a mobilization base producer because of a temporary freeze on the issuance of DD Form 1519s.<sup>1/</sup> The record contains no indication as to what MEI may have been told regarding the duration of the freeze and it is, therefore, uncertain whether MEI was reasonable in waiting another 2-1/2 months before protesting. Moreover, the Army now states that the real reason it denied MEI's request for inclusion in the mobilization base was that there was no need to expand the existing base, and the RFP was issued in order to maintain the existing base. Under these circumstances, we will treat the protest as timely.

10 U.S.C. § 2304(a)(16) authorizes the negotiation of a contract in those instances when the Secretary (or his designee) determines the following:

"(A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development would otherwise be subserved . . ."

Procurements negotiated under this authority are conducted with the usual concern for obtaining maximum competition being secondary to the needs of industrial mobilization, and competition may be restricted to predetermined mobilization base producers in order to create or maintain their readiness to produce critical supplies in future military emergencies. Nuclear Metals, Inc., 64 Comp. Gen. 290 (1985), 85-1 CPD ¶ 217.

We find no basis in the record for questioning the propriety of restricting this procurement to mobilization

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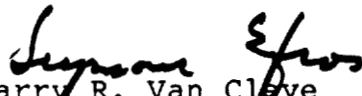
<sup>1/</sup> DD Form 1519 essentially is an agreement between the government and a mobilization base producer regarding what is needed to sustain the producer's production capability.

base producers. The Army's Determination and Findings (D&F), supporting the negotiation under 10 U.S.C. § 2304(a)(16) of procurements for infrared flares, contains a finding that procurement of the critical item from sources other than mobilization base producers would prevent keeping vital mobilization base sources available in the event of national emergency. We think this finding, which is final and will not be reviewed by our Office, see Wayne H. Coloney Co., 64 Comp. Gen. 260, (1985), 85-1 CPD ¶ 186, provides reasonable support for the restriction, and MEI has not demonstrated otherwise.

Regarding MEI's contention that it is qualified to make the flare and should have been accepted as a mobilization base producer, the Army states that, irrespective of the temporary freeze on the issuance of DD Form 1519s, the purpose of the RFP here was to maintain the existing mobilization base and there was no need to expand the existing base. There is no requirement that all qualified firms be accepted as mobilization base producers without regard to whether the agency's anticipated needs will be sufficient to support additional producers. See Pioneer Tool & Die Co., et al., B-211891, et al., Nov. 18, 1983, 83-2 CPD ¶ 584. Rather, decisions as to which and how many producers of a particular item must be kept in active production are complex matters which must be left to the discretion of the military agencies that have the expertise to make them. Thus, those decisions will be questioned by our Office only if the evidence convincingly shows that the agency has abused its discretion. See National Presto Industries, Inc., B-195679, Dec. 19, 1979, 79-2 CPD ¶ 418. The record contains no evidence which would support a finding that the Army abused its discretion in this case.

Finally, we note that MEI's response to the Army's report on this protest consists largely of questions and requests for explanations of the Army's action. MEI is apparently suggesting that we obtain the information and provide the explanations; however, the protester has the burden of proving its case and our Office will not conduct investigations for the purpose of establishing support for a protester's allegations. See A-1 Pure Ice Co., B-215215, Sept. 25, 1984, 84-2 CPD ¶ 357. To the extent that MEI questions the adequacy of the D&F which supports the procurement here, we note that our review discloses no impropriety in that regard.

The protest is denied.

*for*   
Harry R. Van Cleave  
General Counsel